IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 1326 OF 2002

Lahu @ Lahukumar Ramchandra Dhekane)
Residing at Degaon, Tal. Bhor,)
Dist. Pune. At present detained in)
Yerawada Central Prison, Pune 411 006.).. Appellant

Versus

State of Maharashtra).. Respondent

Mr.Abhaykumar Apte for the Appellant.

Mrs.Usha Kejriwal, A.P.P. for the Respondent.

CORAM : H.L. GOKHALE &
A.S. AGUIAR, JJ.

DATE OF RESERVING THE JUDGMENT : 2/7/2004

DATE OF PRONOUNCING THE JUDGMENT: 31/8/2004

JUDGMENT : (Per H.L. Gokhale, J.)

1. This Criminal Appeal seeks to challenge the judgment and order dated 8th August 2002 rendered by III Additional Sessions Judge, Satara in Sessions Case No.10 of 2001, holding the appellant guilty of offences punishable under sections 363, 364-A 386, 302 and 201 of I.P.C. and imposing various punishments for the charges proved. The sentences imposed are as follows:-

(i) Under section 363 I.P.C. : R.I. for 5 years and fine of Rs.2000/-, in default S.I. for six months.

(ii) Under section 364-A I.P.C. : R.I. for 7

years and fine of Rs.2000/-, in default S.I. for one year.

(iii) Under section 386 : R.I. for 7 years and fine of Rs.2000/-, in default S.I. for one year.

(iv) Under section 302 I.P.C. : S.I. for life and fine of Rs.2000/-, in default S.I. for one year.

(v) Under section 201 I.P.C. : R.I. for 2 years and fine of Rs.500/-, in default S.I. for 3 months.

(vi) All sentences are to run concurrently.

2. The alleged incident is supposed to have taken place at village Shirval, Taluka Khandala in District Satara at about 12.30 noon on 29th November 1999. Sanket aged 2 1/2 years, son of the complainant Suryakant Bhande - P.W.30 is stated to have been picked up from his school by an unknown person for ransom. The child was never returned nor was the body of the child found. It is the case of the prosecution that it is the Appellant who has kidnapped the child and he is responsible for his disappearance and, therefore, principally the charge of kidnapping for ransom and murder.

3. The case of the prosecution as principally

narrated by the complainant Suryakant Bhande (P.W.30) is that he resides at Shirval with his wife and two sons. His younger son Sanket was studying in Jr.K.G. in the year 1999 in English Medium M.E.S. High School. The elder son Saurav was studying in IIIrd Standard in the same school. The younger son Sanket was dropped at the school by complainant's brother Vivek on that day at about 9.00 a.m. The wife of the complainant Pratibha is a teacher though working in another school run by Zilla Parishad. The complainant is a building contractor. His wife went to her school at about 10.20 a.m. and at about 11.00 a.m. he left for a construction site at another village named Chauphala. At about 3.00 p.m. he received a phone call from his wife inquiring as to whether he had brought back Sanket from the school. He informed her that he had not. After supervising his work site, by about 4.00 p.m. he came back home. He made a phone call to his wife, who was in her school, whether Sanket had come. Thereafter his wife told him that Sanket had not come to the house and that there was an anonymous call from a person who stated that Sanket was with him and that for returning him Rs.1,00,000/- should be brought to one Bhawani Hotel. There was no hotel by such name. The complainant then went to the school and met the class teacher Anjali Walimbe (P.W.4), who told him that by 12.30 noon one person aged about 25 years had come to the school and that

Sanket had gone with him. The complainant made search with his relatives in the village and other persons. In the evening, he lodged a complaint recording the missing of his son with police outpost at Shirval. It has been treated as FIR.

4. The complainant's further case is that one week thereafter, i.e. on 6th December 1999, in the morning at about 11.00 a.m. he received a phone call. The person speaking on the phone stated that in case he wanted to get back his child, he should bring Rs.1,00,000/- in cash and keep at Khambataki Ghat at a particular turning where a room of the telephone department was situated. He was told not to inform the police else the child will be killed. The complainant arranged the money and went to the particular spot with two other persons and kept it over there. He however realised that there was an error in locating the spot. He took the bag and kept near the telephone room. The police, who had been informed, had come in plain clothes. Till about 2.45 p.m. nobody turned up. The complainant then received a phone call from his cousin on mobile at 3.30 p.m. asking him to come back to Shirval. The complainant returned to his house with the cash. When the complainant reached home, his brother told him that there was one more anonymous call at home stating that the place where money was deposited was surrounded by

police and hence now the amount be kept at Katraj Ghat near Hotel Rama. He told that there was a footway nearby. That will take him towards a tree on which he will find a polyethylene bag bearing name "Bharat Woolen House". Behind the tree one cigarette packet will be kept in a thorny bush. The bag was to be kept below that packet and a whistle was to be given. Thereafter he was to walk back without looking behind. The complainant went to that site accordingly, this time without informing the police. He located the spot, kept the money and gave the whistle and came back. After 10 minutes, he again went to the spot, but the bag was not there. Later-on, the police came and they took search but nobody was found. The child was also not found.

5. For several months, no clue was available. On 5th June 2000 he received a phone call on mobile which was made from Pune. The phone got disconnected. The complainant attached a tape-recorder to his mobile. He received another phone call from Pune. The caller asked him that Rs.1,15,000/- be arranged for returning the child. The child was supposed to be safe in Mumbai. The place and time for paying the money was to be informed on the next day. On the next day at about 12.00 noon he receive the phone call on his mobile. The money was to be taken to a hill at Pune-Ambegaon by-pass. Behind a neelgiri tree, one

packet of cow brand tobacco will be found with a message regarding the amount. The complainant was expected to reach there within an hour. He reached there by about 3.00 p.m. and kept the bag of fake currency notes at that spot. The police officers were standing at a distance. Within 5 minutes, somebody had taken away the bag. The police searched, but nobody was found. The complainant handed over the packet of cow brand tobacco to the police.

6. Thereafter at about 3.45 p.m., he received a phone on his mobile from Hadapsar, Pune. The person threatened him that he will kill his other son as he had informed the police and then the phone was disconnected. The complainant with the help of police found out which was the STD booth at Hadapsar from where the phone call was made. The booth owner one Ganesh Shinde (P.W.26) told him that a person had come on a Suzuki Samurai motorbike. Later, on 10th July 2000 the complainant came to know that in village Nira in the adjoining Purandar Taluka of District Pune, a similar incident had taken place. There the accused had gone for polishing the furniture in the shop of one Chandrakant Sonawane and had sent one letter. The writing of that letter was identical to one on the cow brand tobacco packet. On 17th July 2000, the Satara Police arrested the accused. According to complainant, he was the person who had come for

polishing work at his residence. The complainant stated that at that time he had constructed a new house and the furniture work and the polishing thereof was going on. The accused was coming to his house for polishing work and that work had gone on for a month. The accused had used the time to get acquainted with the family members of the complainant.

7. The case of the prosecution was that after kidnapping Sanket from his school, the accused had gone to a pan shop and got some chocolates for the child. This was at the pan shop of one Ramesh Gadhave (P.W.5) near Hotel Mayur on Khandala-Lonand Road. The accused is supposed to have taken the child thereafter to Wai wherefrom he is stated to have made a phone call from a telephone booth of one Sulabha Kadane (P.W.28). Thereafter he is supposed to have killed the child and kept his school bag and shirt at some other place. These articles were discovered as per the lead given by the accused and as permissible under section 27 of the Evidence Act. The accused is supposed to have deposited Rs.40,000/- out of Rs.1,00,000/- later-on in the Narsapur Branch of Bank of Maharashtra and paid some other amounts to some others. The prosecution has examined the bank officer Shri Jagannath Valhekar (P.W.12) for producing the passbook and the voucher for opening the account. He is also supposed to have returned Rs.5000/- to one

Nanda Chavan from whom he had taken the amount earlier.

8. Thus, the case of the prosecution is that on 29th November 1999 the accused went to the school of Sanket at 12.30 noon. Since nobody had come to pick him by that time, the class teacher Anjali Walimbe (P.W.4) was waiting for somebody to come and pick him up. She was standing at a distance of 8-10 feet from another teacher one Swati Joshi (P.W.9), who was taking the class of IIIrd standard in the varandah of the school. At about 12.30 noon, the accused came to the school and called Sanket. On hearing the call, Sanket went running towards him. Anjali Walimbe asked Sanket whether he knew the accused. Sanket answered in the affirmative and went with him. Thus the accused is reported to have taken the innocent non-suspecting child with him. Thereafter he has gone to the panshop near Hotel Mayur where he is supposed to have taken the chocolates from the panshop of Ramesh Gadhave (P.W.5). He is then supposed to have gone to Wai and made the phone call from the booth of Sulbha Kadane (P.W.28). Thereafter on the same day or a little later, he is supposed to have killed the child. The two teachers Anjali Walimbe (P.W.4) and Swati Joshi (P.W.9) and panshop owner Ramesh Gadhave (P.W.5) are supposed to have seen the accused. The tobacco pouch containing the writing of threat was

comparable with the writing of the accused on a notebook found at his residence. Thereafter the fact that he made phone calls from different telephone booths of Sanjay Salunkhe (P.W.15), Ganesh Shinde (P.W.26) and Sulbha Kadane (P.W.28) is sought to be proved by producing necessary telephone records. The school bag and the shirt of the child is produced from a place as shown by the accused and are identified by the parents when mixed with other school bags and shirts. The accused has also shown the place where he is supposed to have killed the child and left his body in the field of one Mithalal Jain. Thereafter he is supposed to have deposited the aforesaid Rs.40,000/- by opening an account in a bank and paid off some of the loans taken by him. It is alleged that he destroyed some of the evidence which would go against him. The accused is, therefore, alleged to have kidnapped the child for ransom and killed him and later on destroyed the evidence. The body of child is not found.

9. The prosecution has sought to prove its case on the basis of the evidence of the two teachers Anjali Walimbe and Swati Joshi, who were there at the time when the child was picked up from the school, thereafter from the evidence of Ramesh Gadhave (P.W.5), the owner of the panshop from where the accused is supposed to have bought chocolates, and the

evidence of Sulbha Kadane (P.W.28), a STD booth owner at Wai. They are the persons who are supposed to have seen the accused with the child on that day. Thereafter the prosecution has examined the owners of various STD booths wherefrom the accused is supposed to have made the phone calls. Although the body of the child was not found, the fact of his having been killed and body having been destroyed is sought to be proved by production of school bag and shirt which was traced as per the indication given by the accused. His handwriting containing the instructions and the writing on the tobacco pouch is sought to be proved by comparing with the notebooks from his house and by examining the handwriting expert. Thereafter disbursal of the amount received is sought to be proved by documents of deposit in the bank and payment to others. It is submitted that there was no occasion for the accused to have such amount. The prosecution has also relied upon the testimony of the brother of the accused by name Ankush (P.W.10), to whom he is supposed to have made the extra judicial confession and who has stated that the antecedents of the accused were not good. The accused committed robbery once earlier and his brother had given Rs.8500/- to the duped person to settle the matter. He has further stated that the accused had given him Rs.6000/- for agricultural expenses and to his maternal uncle Rs.5000/- for payment of hire charges of a tractor.

10. As against the case of the prosecution, the defence of the accused is that he had not done this crime and that he was innocent. In his statement made under section 313 of Cr.P.C. he denied all those allegations including having opened the account and deposited Rs.40,000/- in Bank of Maharashtra. He has stated that on the relevant day he had gone to his sister staying at village Mukadamwadi. On that night he was sleeping in the Ambabai Temple with his friends when police came there and rounded him up on suspicion and involved him in this case. After making his statement under section 313 of Cr.P.C., he chose to give his further statement on oath. In his deposition, which is recorded as that of D.W.2, he has stated that after rounding him up, he was taken to Khandala and Shirval. On the next day, police had shown him to the two teachers Anjali Walimbe and Swati Joshi and they stated that he was not the person concerned. There were some 7-8 persons in the police station. Their statements were recorded by the police. His statement was also recorded and in the evening he was allowed to go home. He left for home after taking an amount of Rs.50/- from the complainant himself. According to him, the complainant had expressed suspicion on one of his workers by name Amjad. In his cross-examination, the accused accepted that cases of theft of motor cycle were filed against

him by Pune Police and also that Jejuri Police had filed a case of kidnapping and murdering of another child for ransom.

11. It is clear from what is narrated above that the case of the prosecution rests by and large on circumstantial evidence. The body of the child was not produced nor has anybody seen the accused killing the child. That is as far as the allegation of murder is concerned. As far as the case of kidnapping is concerned, the prosecution case rests on the testimony of the two teachers Anjali Walimbe (P.W.4) and Swati Joshi (P.W.9). Thereafter two persons are supposed to have seen the accused with the child on the same day, i.e. Ramesh Gadhave (P.W.5), the panshop owner, and Sulabha Kadane (P.W.28), the lady running the STD booth at Wai. The chain is sought to be completed by leading the evidence of the other STD booth owners and producing the record of telephone department that such phone calls were made from their booths. Further, the writing on the tobacco pouch is sought to be proved by comparing it with the writing of the accused on a notebook found at his residence and the opinion of the hand writing expert. The demand for the ransom is sought to be proved from the evidence of the complainant. The disbursal of the amount collected in ransom is sought to be proved by examining the Bank Manager amongst others. The prosecution has also led

evidence of various panchas for proving the steps taken at various stages of recovery of articles as well as the Special Executive Magistrate before whom identification was done from time to time. It is then submitted that since the child was seen last in the company of the accused and since the child has disappeared thereafter, it is the accused who has to explain as to what has happened to the child. Inasmuch as he is not able to explain it, he is said to be guilty of the charge of murder also. The prosecution has also examined different police officers who dealt with this case at different stages of the matter.

12. As stated above, the learned Sessions Judge, who heard the matter, accepted that a complete chain of events was established and that the accused was responsible for kidnapping for ransom and for murder of the child as also for destruction of the evidence. He has, therefore, held him guilty of various charges which were levelled against him and awarded the punishments as stated above.

13. As far as the kidnapping of the child is concerned, the main stay of the prosecution is the deposition of Anjali Walimbe (P.W.4) - class teacher supported by Swati Joshi (P.W.9) - the teacher of adjoining class. As far as Anjali Walimbe is

concerned, she was 26 years old at the time when she gave evidence, i.e. on 28th April 2002. She was just about 23 years old at the time of the incident and she had joined the school 7-8 months before the date of the incident. On that day, i.e. on 29th November 1999, the Mini K.G. School was over at 12.00 noon, but nobody had come to take home Sanket. She had therefore taken him in the varandah of the school at about 12.30 noon. As per her deposition, the accused came and called Sanket. On hearing the call, Sanket went running towards the accused when she asked him to stop. In the examination-in-chief, she stated that she asked Sanket 2-3 times whether he was knowing the accused and thereafter he had gone with the accused. In the cross-examination, she stated that she could not give any reason as to why it is not recorded in her statement to the police that she had asked Sanket 2-3 times whether he was knowing the accused.

14. At about 3.30 p.m. Anjali Walimbe received a phone call from Swati Joshi, who told her that Sanket had not reached home. Anjali further stated that she was called for identification before the Tahsildar of Khandala Taluka on 16th September 2000 where she identified the accused. She also identified him in the court. In the cross examination, she accepted that on 30th November 1999, i.e. next day after the kidnap, she was called by the police to the Shirval

Outpost. A specific question was put to her as to whether in the outpost, the complainant, his wife and 7-8 persons were present. She replied that she did not remember. Thereafter she stated that she did not know whether the accused was amongst 7-8 persons sitting in that outpost. She however stated that it was not true that she was shown those 7-8 persons and asked to identify them. She further stated that she did not remember whether on seeing those 7-8 persons she had stated that none of them had come to the school. Lastly, she stated that Swati Joshi was also present in the Shirval Police Station.

15. As narrated earlier, the accused has stated that he was rounded up in the night of 29th November 1999 and taken to the police outpost at Shirval. It is his case that he was shown to these two teachers along with others and they had failed to identify him. The complainant Suryakant Bhande has also accepted in para 13 of his cross examination that his 8-10 workers were called to Shirval Outpost on that day. He has however denied that they were shown to the two teachers next day. PSI Satish Mane, who was the officer in-charge of this case, was examined as P.W.32. He had recorded the missing complaint and registered it as C.R. No.130 of 1999 on 29th November 1999. He had recorded the statements of the two teachers on that day, and he has stated this in

examination-in-chief. In the cross-examination, he accepted that on 29th and 30th November 1999 the workers of the complainant were called in the outpost of Shirval for investigation. He has further accepted that on that day, inquiry was going on with the workers of the complainant and with some other persons. He has accepted that he had made inquiries about the accused at his village Degaon on 30th November 1999 and that he was brought to the outpost of Shirval on 30th November 1999. As to whether the two teachers were shown the accused and the other workers, he has denied the suggestion, and then stated that he did not feel it necessary to show them to the lady teachers. Mrs.Kejriwal, learned A.P.P. called this a failure on the part of the police in following the correct procedure. As against that, Mr.Apte, learned counsel for the appellant, submitted that this statement of the officer cannot be accepted. He was the officer in-charge of the investigation. As per his examination in chief, he had recorded the statement of the two teachers on 29th November 1999. He has also accepted in the cross-examination that on that day the spot was shown by Anjali Walimbe and Swati Joshi. He had rounded up the workers of the complainant, one of whom was the accused. Anjali Walimbe had accepted in her cross examination that she was called at the police outpost and that Swati Joshi was also with her. If that was so, one fails to see

as to how it is possible that the concerned police officer did not show the rounded up persons to the two teachers. Otherwise one fails to understand what type of investigation was going on. It is further admitted by PSI Mane that the accused was allowed to go home after this interrogation and was arrested much later on 17th July 2000. Mr.Apte, therefore, submitted that the statement of the officer that he did not think it necessary to show the rounded up persons to the lady teachers cannot be accepted. It stands to reason that the accused must have been shown to them along with others and the accused was not identified and was therefore allowed to go home along with other workers. These teachers have subsequently identified the accused in the test identification parade held after nine and half months on 16th September 2000. In the cross examination, it has been asked to Anjali Walimbe and she has accepted that on the date of the identification parade the news of arrest of the accused along with his photograph was published in the newspaper. It is quite probable that she identified him guided by the news item and photograph. We cannot ignore that the test identification parade was held two months after the arrest of the accused.

16. Similarly, as far as the deposition of Ramesh Gadhave (P.W.5) is concerned, he has stated in his evidence that he remembers that the accused had come

to his panshop on 29th November 1999. He has however accepted in the cross examination that he cannot remember fresh customers. It is difficult to accept that a panwala attending to various clients on a day would identify a person with a child who had come some 8 months before. Similar is the position with respect to the deposition of Sulbha Kadane (P.W.28). She has accepted that some 200-300 persons used to come daily to her booth for making phone calls and yet she remembers that on 29th November 1999 the accused had come with a child. The reason given is that she remembers this because the child was crying. On behalf of the the defence, it is submitted that with this state of evidence, it is just not possible to say that the prosecution has produced credible evidence on kidnapping. Identification of the accused as the person kidnapping and later on seen with the child on that day does not inspire confidence.

17. Mrs.Kejriwal, learned A.P.P., firstly submitted that there is no reason to discard the testimony of the two teachers on account of the prosecution stand that though the accused was rounded up on the date of the incident, they were not asked to identify them. She submitted that the statement of the Investigating Officer ought to be accepted as it is that at that stage he did not suspect the accused and, therefore, he did not think it necessary to show

the workers who were rounded up to the two teachers. She submitted that this could, at the most, be considered as a defect in the manner in which the prosecution has gone about. However, because of an act or omission of the investigating agency, that should not go to the benefit of the accused. She relied upon para 22 and 23 of the judgment of the Apex Court in **Sahadevan v. State, (2003) 1 SCC 534**.

18. Alternatively and additionally she submitted that there was other incriminating material, namely that the tobacco pouch containing the handwriting of the accused was discovered at his instance. That contained the writing asking the complainant to keep the money at a particular place. That writing was compared with the writing of the accused on the notebook collected from his residence and was found to be same. Then there was record from the Telephone Department which showed the phone calls made from different booths on the concerned dates to the complainant. Last but not the least, she submitted that the record from the bank had been produced to show that the accused had opened a bank account and had deposited an amount of Rs.40,000/- over here. He was not a person of such means that he would deposit such an amount over there and then pay some more amounts to some of his relatives. This has happened immediately after the collection of the ransom. She

submitted that the accused had denied all suggestions in this behalf in his statement under section 313 of Cr.P.C. and in fact when given an opportunity to explain, he had declined to clarify the incriminating circumstances. The total denial of these circumstances in fact inculpates him as held by the Apex Court in the case of **Joseph v. State of Kerala, (2000) 5 SCC 797 (para 14)**. She, therefore, submitted that this is a heinous crime. The offence has been proved by circumstantial evidence and the conviction ought to be upheld.

19. We have considered the rival submissions, as noted above. It is difficult to accept the submission of the prosecution that though the accused was rounded up along with the other workers of the complainant on the date of kidnapping and although he was brought to the concerned police outpost, where two teachers were also brought, the teachers were not asked to identify him. There is no dispute on this fact that the accused was rounded up and brought to the police outpost on 29th November 1999 and was kept there on the next day. There is also no dispute that the two teachers were brought over there which is accepted by Anjali Walimbe (P.W.4). In these circumstances, we have got to hold that the accused along with the other workers was shown to these teachers and thereafter set free. It is much thereafter that in July 2000 he was

arrested and two months thereafter the identification parade was held on a day on which the photograph and the name of the accused had appeared in the newspaper. Identification made by Anjali Walimbe (P.W.4), therefore, becomes suspect. Once it is held that the prosecution has not led credible evidence on the aspect of kidnapping, the charge under section 363 of I.P.C. (kidnapping) and section 364-A of I.P.C. (kidnapping for ransom) fails. It is not possible to accept the submission of Mrs.Kejriwal, learned A.P.P., that the accused should not get the benefit of this lapse on the part of the prosecution. In our view, it is a serious lapse and once it is seen that the accused was available for identification, it is not possible to accept that the two teachers were not shown the accused along with the other rounded up persons. Obviously, their identification much later and that too two months subsequent to the arrest of the accused becomes doubtful.

20. With respect to the submission of Mrs.Kejriwal based on the discovery of the tobacco pouch and the shirt and the school bag of the child, here again it is to be noted that these articles are discovered after more than 9 months from the date of the incident. In fact, on the shirt and the school bag, there is no identifying mark and though the complainant had identified them when mixed up with

other school bags and shirts, that itself does not give any credibility to the discovery. As far as the tobacco pouch is concerned, it is such a small piece of paper that it is impossible to accept that it remained at the particular place after some 9 months in the jungle and that it was discovered at the instance of the accused. The telephone bills undoubtedly will show that telephone calls were made to the complainant from the concerned telephone booths. That will, however, not prove that the accused had made those telephone calls. The last and the most significant material against the the accused is that he had opened a bank account and which fact is proved by examining an officer from the bank. The accused has even denied this in his statement under section 313 of Cr.P.C. and of course the same is not truthful. He has also denied having deposited Rs.40,000/- in the account and has not explained wherefrom he had brought the same. It is undoubtedly true that when given an opportunity, the accused must explain the inculpating circumstances. But in the present case, we must note that he is otherwise also accused of theft and robbery. He has accepted that a case of theft of a motor cycle was filed against him by Pune Police. His brother has also stated that he had to get him released earlier when involved in a case of robbery by paying some good amount on his behalf. Faced with such a situation, one cannot

expect the accused to explain as to where from he brought the money inasmuch as he was facing another trial on the ground of murder. There is no doubt that all these circumstances, namely discovery of various articles, the entries of the Telephone Department and non-explanation of opening of the bank account and deposit of money are undoubtedly suspicious. However, suspicion cannot be turned into the basis of a conviction. All these suspicious circumstances become insignificant once the testimony of the two teachers becomes doubtful.

21. The charge against the accused under section 302 of I.P.C. is on the basis that he was last seen with the child and similarly is the charge under section 201 of I.P.C., namely that of destroying evidence since the body of the child is not found. However, once it becomes difficult to accept the charge of kidnapping, these two charges also automatically fail.

22. For the reasons stated above, we are of the view that the prosecution has failed to prove the charges that were levelled against the accused. The appeal is, therefore, allowed. The accused has been in custody from the date of his arrest, i.e. from July 2000. He is directed to be set free unless required in any other case.

(H.L. GOKHALE, J.)

(A.S. AGUIAR, J.)